

Law Review 1277

August 2012

ROA Intervenes in Ohio Lawsuit to Protect Military Voting Rights

By Captain Samuel F. Wright, JAGC, USN (Ret.)

7.0—Military Voting Rights

On Friday, August 3, 2012, the Reserve Officers Association (ROA) and 14 other military associations^[1] filed a motion to intervene as defendant and a brief opposing the plaintiffs' motion for a preliminary injunction in Case No. 2:12-CV-00636 in the United States District Court for the Southern District of Ohio. The plaintiffs in the case are Obama for America (President Obama's official reelection committee), the Democratic National Committee, and the Ohio Democratic Party. The defendants are Ohio Secretary of State Jon Husted and Ohio Attorney General Mike DeWine. The lawsuit challenges the way that Ohio will be conducting early voting (not absentee voting by mail) for the November 6 general election.

In the past, Ohio has conducted early voting^[2] right up to the day before Election Day. Conducting early voting during the weekend before Election Day and through the day on Monday, while simultaneously preparing for Election Day activities, can put a major burden on state and local election officials and make it more difficult for them to conduct a fair election. If an individual can cast an "early vote" as late as the afternoon before Election Day, this can make it difficult or impossible for the election officials to make a notation on the Election Day poll book showing that the individual has already voted, in order to prevent fraudulent double voting.

Accordingly, the Ohio Legislature moved back the deadline for early voting to 6 p.m. on the Friday before Election Day, but the Legislature also chose to exempt Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) voters^[3] from this early deadline—UOCAVA voters are permitted to cast early votes right up through the close of the polls on Election Day.^[4]

The Legislature concluded that UOCAVA voters, and especially active duty service members, were more deserving of an extra three days (Saturday, Sunday, and Monday) of early voting than voters generally. The legislators were well aware that *were it not for the sacrifices of military personnel none of us would have the opportunity to vote in free elections*. The legislators were also aware that active duty service members often have great difficulty in casting absentee ballots that really do get counted. In some major elections, the rate of disenfranchisement among active duty service members has exceeded 50%. The legislators also concluded that there would likely be at most a handful of UOCAVA voters who would seek to cast early ballots after 6 p.m. on Friday and making special accommodations for these special voters would not put a major crimp in preparations for Election Day.

In a 1952 letter to Congress, President Harry S. Truman wrote:

"About 2,500,000 men and women in the Armed Forces are of voting age at the present time. Many of those in uniform are serving overseas, or in parts of the country distant from their homes. They are unable to return to their States either to register or to vote. Yet these men and women, who are serving their country and in many cases risking their lives, *deserve above all others to exercise the right to vote in this election year*. At a time when these

young people are defending our country and its free institutions, the least we at home can do is to make sure that they are able to enjoy the rights they are being asked to fight to preserve." Emphasis supplied. Here is a link to President Truman's letter:
<http://www.trumanlibrary.org/publicpapers/index.php?pid=950&st=&st1>.

President Truman's eloquent words about the brave young men and women fighting the Korean War in 1952 apply equally to their grandsons and granddaughters, and great-grandsons and great-granddaughters, fighting the Global War on Terrorism today.

In their lawsuit, the Obama campaign, the Democratic National Committee and the Ohio Democratic Party assert that giving UOCAVA voters three extra days of early voting violates the Equal Protection Clause of the 14th Amendment to the United States Constitution. Solving this alleged equal protection problem could be accomplished by permitting all voters to cast early ballots on Saturday, Sunday, and Monday (the remedy the plaintiffs seek), but it could just as easily be solved by eliminating the accommodation made for military voters but not other voters.

In our motion to intervene and accompanying brief, ROA and the other 14 intervening military associations forcefully argued that *it is not unconstitutional to make accommodations for active duty service members and military family members that are not made for other voters*. We are concerned that a ruling for the plaintiffs will create a terrible precedent, making it much more difficult for election officials to make special efforts for military voters, to ensure that their ballots are counted.

For 36 years, I have been pushing for reforms in absentee voting laws and procedures for the benefit of military personnel and family members. My pitch has always been that military voters are both more in need of and more deserving of special accommodations than are voters generally. For example, for the college student voting by absentee ballot from a college that is 900 miles away from home, 21 days of ballot transit time is more than sufficient, but for the U.S. Navy sailor on a destroyer 9,000 miles from home 45 days is required. If the plaintiffs' argument in this lawsuit is accepted, it will not be possible to make special accommodations for those who serve in uniform unless the exact same accommodations are made for all voters.

It is not possible to give the same priority to everything. Frederick the Great said, "He who defends everything defends nothing." If election officials are precluded from making special efforts for military voters, those military voters will certainly be disenfranchised.

In a speech to the House of Commons on August 20, 1940, Prime Minister Winston Churchill said: "The gratitude of every home in our Island, in our Empire, and indeed throughout the world, except in the abodes of the guilty, goes out to the British airmen who, undaunted by odds, unwearied in their constant challenge of mortal danger, are turning the tide of world war by their prowess and their devotion. Never in the field of human conflict was so much owed by so many to so few."

The Prime Minister's paean to the members of the Royal Air Force in the Battle of Britain applies equally to the ¾ of 1% of the U.S. population who serve our country in uniform, including the National Guard and Reserve. By their prowess and their devotion, they have prevented and are preventing a repeat of the horrors of September 11, 2001. It must not be unconstitutional to make special accommodations for this special sliver of our population that are not made for all.

The most important and solemn responsibility of the President is to serve as Commander in Chief of the Armed Forces. Recognizing the solemnity of his responsibility, President Truman forcefully spoke up for military voting rights in 1952, without regard to considerations of whether his political party would be helped or hurt by military votes. I call upon the current Commander in Chief to emulate President Truman's example and to direct his official reelection committee to drop this harmful lawsuit. I respectfully suggest that the President should be seeking ways to expand military voting rights, not questioning why service members get additional accommodations and flexibility that are not available to voters generally.

[1] The other 14 intervenors are the National Guard Association of the United States, the Association of the United States Army, the Association of the United States Navy, the Marine Corps League, the Military Officers Association of America, the National Association for Uniformed Services, the Non Commissioned Officers Association, the Army Reserve Association, the Fleet Reserve Association, the U.S. Army Ranger Association, AMVETS, the National Defense Committee, and the Military Order of the World Wars.

[2] Early voting is for the voter who is in town in the days and weeks leading up to Election Day but expects to be away during the hours the polls are open or who expects to find it difficult or inconvenient to vote on Election Day because of advanced age, disability, expected hospitalization, job responsibilities, or other reasons. In most circumstances, early voting will not be useful to the active duty service member, who cannot come home to vote during the days leading up to Election Day any more than he or she can come home on Election Day, but there are imaginable circumstances where the active duty service member could utilize early voting and could benefit from the three additional days that the Ohio Legislature has provided for military voters. For example, let us assume that Seaman Recruit Joe Smith is home from "boot camp" on emergency leave, for his mother's funeral, on the weekend before Election Day. It would be helpful if he could cast his ballot at the county courthouse Sunday afternoon before he returns to the Great Lakes Naval Training Center on the day before the election. Another possible scenario involves an active duty service member who is domiciled in Ohio and also currently serving in the state. Let us say that Senior Airman Mary Jones is serving at Wright-Patterson AFB in Dayton and is registered to vote at the apartment where she lives, just outside the base's main gate. Voting in person on Election Day may be precluded by her military duties, and she may not learn until the weekend before Election Day of this problem. Giving a person like Senior Airman Jones an accommodation not made for voters generally is reasonable and should not be unconstitutional.

NOTE: *The 6th Circuit affirmed the District Court. See Obama for America v. Husted, 2012 U.S. App. LEXIS 20821 (6th Cir. Oct. 5, 2012). On October 16, the Supreme Court denied certiorari (discretionary review). This case is now final.*

[3] UOCAVA gives the right to vote to active duty service members and their voting-age family members, whether within or outside the United States, and to all U.S. citizens outside our country on Election Day.

[4] Of course, if the service member is home on Election Day, he or she should go to the precinct polling place to vote, just like other voters voting on Election Day.